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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

VALERIE THAMES et al.,) No. 08-2617 SC
Plaintiffs,)
v.) **ANSWER OF DEFENDANT UNITED
UNITED STATES OF AMERICA**
Defendant.)

Defendant the United States of America, by and through its counsel, hereby admits, denies, alleges and otherwise responds to Plaintiffs Complaint for Damages (“Complaint”) as follows:

1. Answering paragraph 1, the United States admits that this Court has subject matter jurisdiction over a claim arising under the Federal Tort Claims Act. Except as so expressly admitted, the United States denies each and every allegation in this paragraph.
 2. Answering paragraph 2, the United States admits the allegations in this paragraph.
 3. Answering paragraph 3, the United States has insufficient information to admit or deny the allegations in this paragraph and therefore denies each and every allegation in this paragraph.
 4. Answering paragraph 4, the United States has insufficient information to admit or deny the allegations in this paragraph and therefore denies each and every allegation in this paragraph.

1 5. Answering paragraph 5, the United States has insufficient information to admit or deny the
2 allegations in this paragraph and therefore denies each and every allegation in this paragraph.

3 6. Answering paragraph 6, the United States denies that it owns, operates or maintains a facility
4 known as the “San Francisco Veteran’s Medical Center” and alleges that the facility is known as
5 the United States Department of Veterans Affairs Medical Center, San Francisco. Except as so
6 expressly denied and alleged, the United States admits the allegations in this paragraph.

7 7. Answering paragraph 7, the United States has insufficient information to admit or deny the
8 allegations in this paragraph and therefore denies each and every allegation in this paragraph.

9 8. Answering paragraph 8, the United States has insufficient information to admit or deny the
10 allegations in this paragraph and therefore denies each and every allegation in this paragraph.

11 9. Answering paragraph 9, the United States admits that Robert Thames was a veteran of the
12 United States Marine Corps who died on August 1, 2007. Except as so expressly admitted, the
13 United States has insufficient information to admit or deny the allegations in this paragraph and
14 therefore denies each and every allegation in this paragraph

15 10. Answering paragraph 10, the United States has insufficient information to admit or deny the
16 allegations in this paragraph and therefore denies each and every allegation in this paragraph

17 11. Answering paragraph 11, the United States admits that Robert Thames sought medical care
18 from the United States Department of Veterans Affairs Medical Center, San Francisco on or
19 about December 2005 relating to an alleged car accident; that Robert Thames complained of
20 chest pain and that an x-ray was taken; that a written report of the chest x-ray included a
21 statement that there was a rounded density in the left lower lung field, with a recommendation
22 that the density in the lung be evaluated further with a CT scan of the lungs; that Robert Thames
23 had a chest x-ray taken in February 2007; that Robert Thames died on August 1, 2007. Except as
24 so expressly admitted, the United States has insufficient information to admit or deny the
25 allegations in this paragraph and therefore denies each and every allegation in this paragraph.

26 12. Answering paragraph 12, the United States has insufficient information to admit or deny the
27 allegations in this paragraph and therefore denies each and every allegation in this paragraph.

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13. Answering paragraph 13, the United States has insufficient information to admit or deny the allegations in this paragraph and therefore denies each and every allegation in this paragraph.

14. Answering paragraph 14, the United States has insufficient information to admit or deny the allegations in this paragraph and therefore denies each and every allegation in this paragraph.

15. Answering paragraph 15, the United States has insufficient information to admit or deny the allegations in this paragraph and therefore denies each and every allegation in this paragraph.

The remaining allegations of the Complaint constitute Plaintiffs' prayer for relief to which no response is required. However, the United States denies that Plaintiffs are entitled to the relief requested or to any relief whatsoever. The United States further denies each and every allegation of the Complaint that has not been admitted, denied, or otherwise qualified above.

In further answer to the Complaint and as separate affirmative defenses, the United States alleges as follows:

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' alleged injuries, if any, were proximately caused by Plaintiffs' own negligent or otherwise wrongful conduct.

SECOND AFFIRMATIVE DEFENSE

Any recovery or other award made against the United States must be reduced by the percentage of fault of the Plaintiffs and/or any third party, and any recovery or other award made against the United States for non-economic damages must be limited to the percentage of fault, if any, of the United States.

THIRD AFFIRMATIVE DEFENSE

Pursuant to 28 U.S.C. § 2675, Plaintiffs are prohibited from claiming or recovering an amount against the United States in excess of that which was set forth in any claim presented to the United States.

FOURTH AFFIRMATIVE DEFENSE

Pursuant to 28 U.S.C. § 2674, Plaintiffs are prohibited from recovering any amount for prejudgement interest or punitive damages against the United States.

FIFTH AFFIRMATIVE DEFENSE

Pursuant to 28 U.S.C. § 2412(d)(1)(A), Plaintiffs are prohibited from recovering any attorneys' fees from the United States.

SIXTH AFFIRMATIVE DEFENSE

Pursuant to 28 U.S.C. § 2402, Plaintiffs are not entitled to a trial by jury.

SEVENTH AFFIRMATIVE DEFENSE

To the extent Plaintiffs have failed to exhaust administrative remedies with respect to any claim, that claim should be dismissed.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' damages, if any, are barred by failure to mitigate.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' recovery, if any, is barred by the doctrine of unclean hands, laches and estoppel.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs' alleged injuries were proximately caused by the intervening or superseding acts of someone other than an employee of the United States acting within the scope of his or her employment.

ELEVENTH AFFIRMATIVE DEFENSE

To the extent this action is brought pursuant to the Federal Tort Claims Act, the court lacks subject matter jurisdiction over any defendant other than the United States, including, but not limited to, individual defendants.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs' cause of action is barred by the applicable statute of limitations.

THIRTEENTH AFFIRMATIVE DEFENSE

The United States reserves the right to assert additional affirmative defenses in the event that such additional affirmative defenses would be appropriate.

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WHEREFORE, for the reasons set forth above, the United States asserts that this action should be dismissed and judgment entered in their favor, with appropriate costs awarded.

JOSEPH P. RUSSONIELLO
United States Attorney

By: /s/
Michael T. Pyle
Assistant U.S. Attorney